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THE EXCEPTION THAT BECAME THE RULE

John Schatz, Jr.*

In Anglo-American Jurisprudence it has been traditional that a defendant in a criminal case can be tried only for the offense charged in the accusatory pleading. Evidence of other independent crimes that have no direct tendency to prove a material fact involved in the crime charged is inadmissible. However, to this general rule there are several exceptions.

Evidence of other crimes is always admissible when such evidence tends directly to establish the particular crime charged, and such evidence is usually competent to prove motive, intent, absence of mistake or accident, a common plan, scheme or design, or the identity of the person charged with the commission of the crime for which the defendant is on trial.

The main objection to the admissibility of such evidence centers about the prejudicial effect it may have on the defendant's case in the minds of the jurors. There can, however, be no question but that in some cases evidence of other criminal acts may have a substantial degree of probative value. When plan, scheme or design evidence is admitted under a limiting instruction it is generally concluded that the probative value of the evidence outweighs the prejudicial effect and the fact that such evidence may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. It is also held that the remoteness of the prior wrongful conduct affects only the weight of the evidence, and not its admissibility.1 Thus in California it has been held proper in a murder case for the prosecution to introduce evidence of a murder committed by the defendant some eighteen years prior to the murder for which the defendant was on trial.2

The admissibility of plan, scheme or design evidence is not determined by the nature of the offense charged, but rather by the degree of common features that exist between the prior wrongful conduct and the crime charged. The degree of similarity between the two must be such as to warrant a strong inference that if the defendant committed the prior wrongful act he probably committed the crime charged. The initial determination of the degree of similarity is for the trial judge, and where a sufficient degree of similarity exists between the prior wrongful conduct and the offense charged, the appellate courts have upheld the admissibility of such evidence under the plan, scheme or design exception.

There are many examples of plan, scheme or design evidence having been admitted in many different types of cases. The following examples, while by no means complete, will serve to illustrate a few situations where this particular type of evidence has been admitted.

1. Murder; People v. Lisenba.3 During the trial of the defendant on a charge of murdering his wife for her insurance, the prosecution introduced evidence tending to show that the defendant had murdered a prior wife for her insurance.

2. Conspiracy; People v. Malone.4 On a charge of conspiracy to commit abortion, it was held admissible to introduce testimony that prior

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3. 14 Cal. 2d 403 (1939).
to the offense charged the defendant had, on separate occasions, performed abortions on two women in another county.

3. Pandering; People v. Bell.\(^5\) Similar acts of pandering were admitted in evidence.

4. Rape; People v. Cassandras.\(^6\) In a prosecution for forcible rape upon one woman, the court admitted testimony to show that five months prior to the act charged, the defendant, under similar circumstances, had raped another woman.

5. Abortion; People v. Vosburg.\(^7\) It was held proper to introduce evidence of other abortions performed by the defendant on three women other than the complaining abortee.

6. Sodomy; People v. Westek.\(^8\) In a prosecution for sodomy and lewd conduct with boys, evidence that the defendant had committed similar offenses on other boys was held admissible.

The general plan, scheme and design exception has frequently been held applicable to show other burglaries, larcenies, forgeries and robberies where the other offense was committed under circumstances similar to the offense charged.

The versatility as well as the utility of plan, scheme and design evidence is uniquely demonstrated in the two People v. Sullivan\(^9\) cases. The defendant, Sullivan, frequented a dance hall where he met a young woman, danced with her, asked to take her home, drove to a spot near a park, encouraged her to drink whiskey, and when she resisted his advances struck her and raped her. Upon his arrest Sullivan was charged with forcible rape and entered a plea of not guilty. While on bail awaiting trial, he went to another dance hall, met another young woman, danced with her, asked to take her home, drove to a spot near a park, encouraged her to drink whiskey, and when she resisted his advances struck her and raped her. During the trial on the first rape charge evidence of the second similar offense was held admissible to show a plan, scheme or design.

Thereafter Sullivan was tried on the second rape charge, and during the course of the trial the prosecution was permitted to introduce evidence of the defendant's similar offense as establishing a plan, scheme or design.

Another of the unusual aspects of the admissibility of plan, scheme and design evidence is the absence of any requirement that the defendant be convicted or even charged with the prior offense. In fact, several California cases have concerned themselves with the issue of whether or not evidence of a prior offense would be admitted where the defendant was charged with said prior offense and the charge was thereafter dismissed.\(^{10}\)

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8. 31 Cal. 2d 469 (1948).
These cases established that a dismissal of such prior charge does not preclude the introduction into evidence of the prior offense if such evidence is otherwise admissible. Once the admissibility of such prior offense had been established, three California cases permitted evidence of the prior offense where the defendant had been charged, tried and acquitted of the prior offense.\textsuperscript{11}

The multitude of cases coming within the exception to the general rule supports the conclusion that in recent years the exception has been so utilized that the rule has become the exception and the exception the rule.